SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1460

STATE NATIONAL BANK OF ALABAMA, et al.,
Petitioners,

v.

WILLIAM H. ELLIS,
Respondent,

and

CENTRAL BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

THE AMERICAN NATIONAL BANK OF GADSDEN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF OF RESPONDENTS IN OPPOSITION

ROBERT McD. SMITH
WILLIAM G. SOMERVILLE, JR.
Counsel for Respondents

LANGE, SIMPSON, ROBINSON & SOMERVILLE
1800 City Federal Building
Birmingham, Alabama 35203
Of Counsel

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

## INDEX


Page

Opinions below ..... 1

Jurisdiction ..... 2

Questions presented ..... 2

Statutes involved ..... 2

Statement ..... 2

Argument ..... 7

I. The issue in this case is uniquely of limited import and application, not warranting review by this Court ..... 7

II. The decision below is clearly correct ..... 11

Conclusion ..... 13

Appendix A ..... A-1

Appendix B ..... A-2


### Cases Cited


First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966) ..... 11

Lewis v. Fidelity Deposit Co., 292 U.S. 559 (1933) .. 11

United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963) ..... 12


### Statutes Cited


Alabama Cole 1940, Title 5, §§ 170-175 (Recomp 1958) 2, 5

Alabama Code 1940, Title 5, §§ 181-184 (Recomp 1958) .....5, 6, 7

Pub. L. No. 81-706, 64 Stat. 455, August 17, 1950 .... 11

12 U.S.C., § 35 ..... 12

12 U.S.C., §§ 214-214c .....2, 3, 4, 8, 9, 10, 11, 12, 13

12 U.S.C., § 215, 215a .....10, 12

15 U.S.C., § 78m(d) ..... 3

**Miscellaneous Cited**

Birmingham Magazine, February 1971, page 5 ..... 9

Hearing before Senate Committee on Banking & Currency, 86th Cong., 1st Sess., on H.R. 8159 and H.R. 8160, p. 59 ..... 12

95 Cong. Rec. 10500 (Aug. 1, 1949) ..... 11

36 Federal Register 2881-2882 (February 1, 1971) ... 9

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### OPINIONS BELOW

The original opinion of the district court (Petition, App. B, pp. 23A-28A) and the amendment thereof (which appears in Appendix A hereto) are unreported. The opinion of the court of appeals (Petition, App. A, pp. 1A-22A) is reported at 434 F.2d 1182.

## JURISDICTION

The jurisdictional requisites are adequate as set forth in the Petition, at p. 2.

## QUESTIONS PRESENTED

1. Whether, under 12 U.S.C. §§ 214-214c, a national bank in Alabama may merge into a state bank although there is no state law which authorizes a state bank in Alabama to merge into a national bank without the approval of the state banking superintendent.

2. Whether an Alabama state law authorizing state banks to consolidate with national banks is sufficient, under 12 U.S.C. § 214c, to permit a national bank in Alabama to merge into a state bank.

## STATUTES INVOLVED

In addition to the statutes cited in the Petition (p. 2; App. C, pp. 29A-35A), the following statute is involved: Alabama Code 1940, Title 5, §§ 170-175 (Recomp. 1958), set forth in Appendix B, *infra*, pp. A-2–A-4.

## STATEMENT

This litigation involves the proposed merger of State National Bank of Alabama into Central Bank and Trust Company. State National, a national banking association, is the largest bank in the North Alabama-Tennessee Valley region and operates, on the basis of "grandfather" rights, branch banks in twelve counties, being the only bank in Alabama having multi-county branches. Central is a state bank headquartered in Birmingham.

A group of Central directors and other persons close to Central acquired in the late summer of 1968 "working control" of State National through purchases and poolings of State National stock. Several months after the

acquisition of control, there was devised a merger plan which proposed to merge State National into Central under Central's charter. The plan specified that a "new corporation shall **not** be formed by this agreement and plan of merger" (emphasis in the original), thus stressing the election of unification through merger rather than consolidation.

On January 10, 1969, an action was commenced by a State National stockholder, William H. Ellis, for declaratory and injunctive relief against consummation of the proposed merger. Another action seeking similar relief was brought later by other banks located in the North Alabama and Birmingham areas. The grounds for relief were: (1) the proposed merger violated the provisions of 12 U.S.C. §§ 214-214c, the federal statute which authorizes the merger of a national bank into a state bank; (2) a transfer to Central, by merger, of State National's "grandfather" rights to branch bank would not be permitted by the Alabama laws prohibiting branch banking; (3) the proposed merger would violate federal antitrust laws; and (4) violations, added by amendment after discovery, of certain federal securities laws, including violations in the proxy statement for the merger and violations of the Williams Act [§ 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d)] through failures to file required disclosure statements after acquisition of the control stock in State National.

The first two of these issues were severed in the district court for a separate hearing on stipulated facts.[1] The

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[1] As framed in the district court's pretrial order, these two issues were: "(1) Is the proposed merger between State National Bank of Alabama and the Central Bank and Trust Company legally permissible under the existing state and federal law? (2) If such merger is permissible, may the surviving bank, Central Bank and Trust Company, retain and operate each of the branches of both banking associations, including State National's main office in Decatur as a branch?" [Petition, p. 24A.]

district court determined only the first issue, holding that the proposed merger was not legally permissible under existing state and federal law, and did not reach the other pending issues. (Petition, App. B, pp. 23A-28A; App. A, *infra*.) From the district court's judgment enjoining consummation of the merger, the defendant banks appealed to the Court of Appeals for the Fifth Circuit, which reached the same conclusion on this single issue and affirmed the judgment of the district court.

The narrow issue on which the decisions of the courts below are based is whether the existing Alabama law satisfies the conditions of 12 U.S.C. §§ 214-214c with respect to the particular form of corporate unification—merger—which petitioners have employed in this instance. The statute, 12 U.S.C., §§ 214-214c, was enacted in 1950 to permit, for the first time, national banks to transfer into the state banking system. Its dominant purpose, as the courts below observed, was to achieve absolute equality in inter-system transfers. And it was to that end that Congress prescribed the condition, now found in § 214c, that no conversion, merger, or consolidation of a national bank into the state system would be permitted "unless under the law of the state in which such national banking association is located state banks may without approval by any state authority convert into and merge or consolidate with national banking associations under limitations or conditions no more restrictive than those contained in § 214a."

The district court found that existing Alabama law, while permitting conversions or consolidations of state banks into the national system without approval of state authority, specifically required the approval of the State Superintendent of Banks before a state bank could merge into the national system (Petition, p. 25A). It therefore concluded (*id.*, p. 26A):

> "In other words, if a national bank and a State bank wish to merge, with the surviving bank to be the State bank, the law of the State where the national bank is located must allow a State bank to merge with a national bank without approval of any State authority. Under existing Alabama law, this cannot be accomplished. This construction certainly is the most logical in light of the Congressional intent to keep the national and state banking systems on an equal level of operation as illustrated by the legislative history of § 214c."

The court of appeals, similarly noting that the "undisputed purpose" of the pertinent federal statutes "is to promote equality between the federal and state banking systems" and that the federal statutes provide distinctly for three separate methods of transfer into and from the national banking system, concluded as did the district court that (Petition, p. 14A):

> "A national bank may not merge with an Alabama state bank under the state bank charter unless that state allows an unfettered merger between a state bank and a national bank under the national bank's charter."

The court of appeals also rejected petitioners' argument that the Alabama law[2] which provides for consolidation—rather than the Alabama law[3] which provides for merger but requires the approval of the state banking superintendent—embraces merger so as to satisfy 214c's condition with respect to merger (Petition, p. 17A):

> "We find no support in decided cases for the assertion that the Alabama legislature has traditionally used

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[2] Sections 181-184, Title 5, Alabama Code 1940 (Recomp. 1958).

[3] Sections 170-175, Title 5, Alabama Code 1940 (Recomp. 1958).

> the terms, consolidation and merger, interchangeably. We find no reason to infer that the legislature meant to use the terms as synonyms when it enacted Sections 181-184. We conclude that Sections 181-184 of 5 Alabama Code do not provide for the unfettered merger of a state bank with a national bank under the latter's charter. The Alabama legislature through either design or neglect has failed to respond to the Federal merger provisions enacted in 1950. Since Sections 171-175 of 5 Alabama Code permit bank mergers only with the express approval of the State Banking Superintendent, we are clear in the conclusion that the merger sought here is violative of Federal law."

The court of appeals carefully pointed out, however, that by virtue of the provisions in §§ 181-184, Title 5, Alabama Code 1940, a national bank in Alabama could "consolidate with an Alabama state bank . . . without controversy" (Petition, p. 3A). It found significant in this connection the fact that most other states, in response to the passage of § 214c and the federal laws relating to mergers of banking institutions, had enacted reciprocal state legislation specifically permitting state banks to merge, as well as to consolidate and convert, into the national system—whereas Alabama has not similarly responded and has made since 1931 no change in its pertinent laws (Petition, p. 14A).

## ARGUMENT

### I

### The Issue in This Case Is Uniquely of Limited Import and Application, Not Warranting Review by This Court

1. The issue involved is unique to the present case and is not likely to recur. The decision of the court of appeals was only that, due to absence of any Alabama law permitting state banks to merge into national banks without the approval of state authority, a national bank in Alabama cannot **merge** into a state bank. It specifically observes, however, that a national bank in Alabama **may** convert into or **consolidate** with a state bank, in view of the state law (§§ 181-184, Title 5, Alabama Code 1940), permitting state banks in Alabama to convert into or consolidate with a national bank without approval of state authority. The circumstances in which petitioners find themselves and the issue which they now raise thus could easily be avoided merely by consolidating, instead of trying to merge, the banks. As long as the Alabama legislature does not enact responsive legislation for state-to-national mergers,[4] as have other states, any other banks in Alabama which should wish to unite under state charter can and udoubtedly will obviate any similar difficulty simply by uniting through consolidation rather than merger. Indeed, the issue could readily be eliminated from this case itself if the petitioners only changed their proposed unification from merger to consolidation. If, as petitioners have asserted as their major premise in the petition and

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[4] Following the example of the court of appeals (Petition, p. 5A), we use the phrases "state-to-national" and "national-to-state" as shorthand terminology describing, respectively, the movement of a state bank to the national system and the movement of a national bank to the state system.

in the courts below, the terms "merger" and "consolidation" are used synonymously in the banking laws and there is no substantial distinction between them, then clearly neither the petitioners nor any other banks in Alabama could be affected by the holding that they may consolidate but may not merge. But if, on the other hand, there is (as the courts below concluded), a difference between merger and consolidation in the banking laws, then it is equally clear that the manifest intent of Congress to achieve equality in its enactment of §§ 214-214c would be subverted if national banks were permitted to merge into state banks while, under the state law, state banks can only consolidate with national banks without approval of the state banking superintendent. In the period of almost two years which have elapsed since the judgment of the district court the petitioners have had ample time to eliminate this issue from the case which could be accomplished simply by amending their existing plan of unification.[5]

2. The issue is unique to the laws of Alabama. As the court of appeals observed (Petition, p. 14A, n. 9), most states, other than Alabama, have responded to § 214c by enacting complementary legislation providing for all three of the methods (conversion, consolidation, and merger) for state-to-national transfers. Alabama, through choice or oversight, has not responded with reciprocal legislation. At all events, therefore, the issue in this case is one which concerns only Alabama—and only two banks in that state.

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[5] The lower courts did not, as asserted by the petition (p. 11), "penalize" the petitioners because they seek to merge rather than consolidate. It is more accurate to conclude that petitioners have penalized themselves by refusing to unite in the manner permitted under Alabama law. Nor is there any substance in the petitioners' contention (p. 11) that the language of 12 U.S.C. § 214b requires that a national-to-state unification be a merger. The limited purpose and effect of the language is § 214b to which petitioners refer are well recognized, as the opinion of the court of appeals concluded. (Petition, App. A, pp. 8A-9A.)

As an indication of the narrow and unique character of the present issue and the condition of Alabama law from which it arises, it is noteworthy that this is the only instance in which the issue has arisen during the period of over twenty years since the enactment of § 214-214c.

3. The issue is unique to the present condition of Alabama law. The deficiency in Alabama law on which the decisions below were based could be eliminated immediately by reciprocal state legislation like that enacted by the other states in response to the federal laws. To our knowledge no attempt has been made to obtain the passage of such legislation in Alabama.

4. The issue here quite possibly will be rendered moot. Petitioners recently have made application to the Federal Reserve Board for approval of a registered bank holding company to acquire and hold the stock of State National and Central.[6] They also have announced publicly that they have agreed with the Federal Reserve Board "to abandon our original merger plan," which is involved in this case, when they obtain approval of the bank holding company.[7] Their application for approval of the holding company will be heard by the Federal Reserve Board on May 13, 1971.

This case thus involves an issue which results from the peculiar posture of the law of a single state, Alabama; which easily can be avoided by any other banks in Alabama wishing to unite under §§ 214-214c and could indeed be as easily eliminated by the petitioners from this case; which could be eliminated in Alabama, as it has been in other states, by appropriate responsive legislation applicable to mergers; and which may well be mooted by aban-

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[6] Notice of their application to the Federal Reserve Board is published in 36 **Federal Register** 2881-2882 (February 1, 1971).

[7] This announcement appears in an advertisement placed by petitioner Central in the February 1971 issue of the magazine, **Birmingham**, at p. 5.

dowment of the proposed merger. In short, this case presents a situation which has never occurred previously, and is not likely to occur again, either in Alabama or elsewhere. It is not even made to appear, moreover, that the decisions below could have any effect of substance on the petitioners themselves if, as stated by the court of appeals, they are free to consolidate.

The assertion by petitioners (pp. 6-7) that the decision of the court of appeals could "subject to attack" previous unifications of state banks into national banks under 12 U.S.C., § 215, is wholly spurious and purely hypothetical. There is nothing in the decision which remotely suggests any ground on which former transactions under § 215 of the sort alleged in the petition could be attacked or affected—if it be a fact that any such transactions have occurred. The court of appeals decided only that because existing Alabama law requires state approval for a state-to-national merger the condition of § 214c for a national-to-state merger is not met, and no amount of argument concerning imagined ramifications and hypothetical lawsuits can expand its narrow application and effect.

The other assertion by petitioners is their effort to expand the effect of this case—their assertion (Petition, pp. 7-8) that the decision below deprives a national bank in Alabama altogether of the opportunity to use §§ 214-214c—is simply not true. The opinion of the court of appeals specifically states that a national bank in Alabama may use §§ 214-214c to consolidate or convert. It holds only that a national bank in Alabama may not use §§ 214-214c to merge so long as Alabama law requires the approval of the state banking superintendent before a state bank in Alabama may merge into the national system. This result was based on and is perfectly consistent with Congress' only purpose, in the enactment of these laws, to assure equality in the methods of transfer to and from each system.

There is, in sum, no important question of federal law in this case. The only issue which it involves is one of extremely limited effect and application. Certainly, it does not occasion review by this Court.

## II

## The Decision Below Is Clearly Correct

The court of appeals concluded that (1) a national bank is not authorized to merge into a state bank under 12 U.S.C., §§ 214-214c, unless, under state law, a state bank can likewise merge into a national bank without the approval of any state regulatory authority, and (2) Alabama law does not authorize a state bank to merge into a national bank without the prior approval of the state banking superintendent. Its decision was reached in an exhaustive opinion treating fully the contentions of the petitioners and considering in detail the statutory framework and legislative history from which its conclusion followed.

Before 1950 national banks could not transfer into a state banking system without dissolution and re-incorporation. That year Congress enacted the law[8] which gives national banks the right to transfer. 12 U.S.C., §§ 214-214c. The object of the legislation was to establish "exact equality" for inter-system transfers[9] in accordance with Congress' traditional "policy of equalization" of the national and state components of the dual banking system.[10]

The statute makes provisions for national-to-state transfers, without the necessity of approval by any federal

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[8] Pub. L. No. 81-706, 64 Stat. 455, August 17, 1950.

[9] 95 Cong. Rec. 10500 (Aug. 1, 1949).

[10] See, *e.g.*, First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966); Lewis v. Fidelity Deposit Co., 292 U.S. 559 (1933).

regulatory authority, by three distinct and alternative methods: conversion, merger, or consolidation. 12 U.S.C., § 214a. To assure equality and to prevent any disadvantage to the national system was the purpose of § 214c, which conditions such national-to-state transfers by conversion, merger, or consolidation upon the existence of state-law provisions authorizing like state-to-national transfers.

The present federal statutory scheme, as the opinion of the court of appeals shows (Petition, App. A, pp. 10A-14A), makes provision for the three distinct and alternative methods of transfer not alone in the national-to-state direction (§ 214a), but also in the state-to-national direction: state-to-national conversions in 12 U.S.C., § 35; consolidations in 12 U.S.C., § 215; and mergers in 12 U.S.C., § 215a. As demonstrated in the opinion of the court of appeals (Petition, App. A, pp. 10A-14A), the structure, language, and legislative history of §§ 215 and 215a cannot be squared with the contention of the petitioners (*e. g.*, p. 17) that these two statutes do not recognize and provide for consolidation and merger as distinct and alternative methods of corporate unification.[11]

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[11] As shown by statements quoted by the court of appeals (Petition, pp. 12A-13A) from the legislative history to the 1952 merger statute (§ 215a), Congress certainly recognized and intended that the new statute would provide a method of unification different from that of consolidation already in existence. Petitioners, however, stress the language of the old consolidation statute (§ 34a), contending that it actually provided for merger instead of consolidation. They fail to mention, among other things, that the consolidation statute (§ 34a) in 1959 not only was recodified as § 215 but also was amended in order to "clarify the existing statutes on consolidations and mergers . . . of state banks with national banks." Hearing before Senate Committee on Banking & Currency, 86th Cong., 1st Sess., on H.R. 8159 and H.R. 8160, at p. 49. As a result of these changes there now can be no doubt that, as Congress had previously understood, the consolidation statute (§ 215) provides for consolidation and the merger statute (§ 215a) provides for merger. See **United States v. Philadelphia Nat. Bank**, 374 U.S. 321, 322, n. 7 (1963).

Federal laws thus provide three distinct methods for state-to-national transfers and likewise, but dependent on the existence of complementary state laws, three methods for national-to-state transfers. The provision in the Alabama laws for only state-to-national consolidation and conversion without administrative approval would satisfy § 214c's condition for merger only if consolidation and merger were functional equivalents, which they are not—as the decisions below correctly concluded—under either Alabama or federal law. The court of appeals thus was clearly correct in its decision that "the proposed merger is violative of federal law because under Alabama law a state to national merger must be approved by a state official."

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT McD. SMITH

WILLIAM G. SOMERVILLE, JR.
Counsel for Respondents

LANGE, SIMPSON, ROBINSON
& SOMERVILLE
1800 City Federal Building
Birmingham, Alabama 35203
Of Counsel

April, 1971

# APPENDIX

## APPENDIX A

### Order

(Filed July 7, 1969)

On this the 2nd day of July 1969, the Court of its own motion amends its opinion entered in this case on the 17th day of June 1969, by striking the word "can" in line 7 of page 4 of said opinion and substituting the word "cannot" therefor immediately after the word "bank" and before the word "convert", so that the complete sentence in which the amendment appears will read:

"The language used by Congress throughout the statute is inducive in construing the statute to mean, that unless a State bank can convert into, merge with and consolidate with a national bank without State approval, then a national bank cannot convert into, merge with and consolidate with a State bank."

Said amendment to relate back to June 17, 1969.

The Court further amends its order entered in said cause on June 17, 1969, for clarification purposes only, adding to said order the following:

"In rendering this order the Court did not reach nor consider the issue of whether or not the surviving bank may retain and operate each of the branches of both banking associations, including State National's main office in Decatur as a branch in the event such merger were legally permissible."

Said order in all other respects to remain unchanged.

Done this the 2nd day of July 1969.

s/ Daniel H. Thomas
United States District Judge

## APPENDIX B

### §§ 170-175, Title 5, Alabama Code 1940

§ 170. (6403) Banks or trust companies may be merged or consolidated.—Any bank or trust company doing a banking business may consolidate or merge with or transfer its assets and liabilities to another bank or trust company, and any bank or trust company doing a banking business may move its office or place of business from one city or town to another city or town within the state. (1919, p. 837.)

§ 171. (6404) Proceedings to effect merger.—Before such consolidation, merger or transfer shall become effective, the following proceedings must be had and done: The board of directors of each bank or trust company affected must pass a resolution stating that such consolidation, merger or transfer is desirable, and order the officers of the bank to call a meeting of the stockholders to consider the proposition. Upon the passage of such resolution by the directors, the officers shall mail a notice of such meeting to each stockholder, at his last known place of residence, postage prepaid, at least thirty days before the date set for the meeting of stockholders, which notice shall specify the date and place of meeting and the purpose for which the meeting is to be held. A copy of the resolution must also be forwarded to the superintendent of banks for his information, and he shall investigate the advisability of such consolidation, merger or transfer. On the day of the meeting of the stockholders a resolution may be prepared setting forth the desirability of the consolidation, merger or transfer of the place of business of such bank or trust company, which shall set forth the terms, etc., of such consolidation, merger or transfer, and such other matter as the stockholders may see proper, not contrary to law.

If a majority of the stock is represented at such meeting, and vote in the affirmative for such resolution and the superintendent of banks shall approve all of the proceedings, and it is his judgment that the same would be for the best interest of the institution or institutions affected, such resolution shall have the force and effect of consolidating or merging such institution with the other institution, provided such action of the other institution is likewise satisfactorily passed by its stockholders. If the proposition to transfer the place of business from one town or city to the other is affirmatively voted for by a majority of all the stock of the institution and the superintendent of banks, after careful investigation is of the opinion that it is wise to change or transfer the place of business to another town or city, such transfer shall be made. (1919, p. 837.)

§ 172. (6405) Certificate of proceedings forwarded to superintendent of banks.—In either case a certificate of all the proceedings, including a copy of the minutes of the meeting of the board of directors, at which the resolution was passed, the notice which was given to each stockholder, and a copy of the minutes of the stockholders' meeting, shall be made and certified to by the president and cashier of the institution under the seal thereof, and acknowledged before a notary public as deeds are required to be acknowledged by a corporation and forwarded to the superintendent of banks for his certificate of approval. (1919, p. 837).

§ 173. (6404) Certificate of approval by superintendent of banks.—If the superintendent of banks approves the entire proceedings, he shall issue his certificate of approval in writing, in duplicate, one being filed in his office and the other forwarded, along with the certificate, to the probate judge of the county, for record at the expense of the institution affected. (1919, p. 837.)

§ 174. (6407) Investigation of institutions; expenses of. —Before approving proceedings to consolidate one such institution with another, the superintendent of banks shall cause to be made an examination of each such institution, to determine whether the interest of the depositors, creditors and stockholders of each are protected, and that such consolidation or transfer is made for legitimate purposes, and his consent or rejection of such consolidation or transfer shall be based upon such examination and investigation. The expense of such examination shall be paid by such institution. No such consolidation or transfer shall be made without the written consent of the superintendent of banks. (1919, p. 837).

§ 175. (6408) Appeal to circuit court from decision of superintendent of banks.—If such consent is refused, an appeal may be taken therefrom to the circuit court of the county where such institution is located, said court considering the same in equity. This article shall apply to banks having branches, and to any branch office thereof, in the same way as it applies to other banks. (1919, p. 837.)